

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>SHEINMAN PROVISIONS, INC.,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	<b>CIVIL ACTION</b>
<b>v.</b>	)	<b>NO. 08-cv-453</b>
	)	
<b>NATIONAL DELI, LLC,</b>	)	
	)	
<b>Defendant.</b>	)	

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**MEMORANDUM OPINION AND ORDER**

**RUFE, J.**

**July 15, 2008**

Before the Court is Defendant's Motion to Dismiss Plaintiff's Complaint, Plaintiff's Response in Opposition, and Defendant's Reply. Defendant's Motion asserts that Plaintiff has failed, in part, to state a claim upon which relief may be granted for breach of contract, and that it has failed to state a claim for fraud in the inducement, unjust enrichment, and tortious interference with contractual and business relationships, as alleged in the Complaint. Defendant seeks dismissal of the breach of contract claim in part, and dismissal of the remaining claims in their entirety. For the reasons that follow, the Court will grant Defendant's Motion.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

As this matter is before the Court on a motion to dismiss, we recite the facts as alleged in the Amended Complaint and assume they are true for the purpose of this motion.<sup>1</sup> Plaintiff and Defendant companies are both involved in the food distribution business. On or about September 21, 2006, Plaintiff Sheinman Provisions, Inc. ("Plaintiff" or "Sheinman") and Defendant

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<sup>1</sup> E.g., Rogers v. Am. Can Co., 305 F.2d 297, 318 (3d Cir. 1962).

National Deli, LLC (“Defendant” or National Deli”) entered into an Inventory Purchase, Asset Rental and Reimbursement Agreement (“Asset Rental Agreement”), whereby National Deli leased assets from Sheinman including, but not limited to, Sheinman’s customer list, interest in assumed contracts, interest in the use of Sheinman’s business names, and records and information necessary for the continued operation of Sheinman’s business. Under the Asset Rental Agreement, the parties also agreed that Sheinman would sell certain of its inventory to National Deli, and National Deli would reimburse Sheinman for certain business expenses. The term of the Asset Rental Agreement is set by, and identical to, the term of the employment agreements of two of Sheinman’s principals who became executives of National Deli under the agreement.

The Asset Rental Agreement contains an express provision obligating the parties to exercise good faith and fair dealing in the performance of their respective obligations thereunder. The clause explains that this obligation of good faith and fair dealing may be enforced by any of the parties at law or in equity. During the course of discussions between the parties prior to the execution of the Asset Rental Agreement, the principals and representatives of National Deli assured and represented to the principals of Sheinman that it desired, in good faith, to enter into a “fair and mutually-beneficial business relationship” in a manner which ultimately came to be reflected in the terms of the Asset Rental Agreement.<sup>2</sup> The principals of Sheinman decided to enter into the Asset Rental Agreement as a result of, and in reliance upon, these conversations with National Deli’s Principals. Sheinman alleges that when National Deli made these representations, it never intended to honor its obligations to Sheinman under the Asset Rental Agreement, or even to exercise good faith and fair dealing in the performance of its duties.

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<sup>2</sup> Compl. ¶4.

Plaintiff alleges that the principals of National Deli actually intended to use the Asset Rental Agreement, and the business relationship with Sheinman created thereby, as a covert means to unlawfully misappropriate and convert to its own use Sheinman's assets and business relationships, without adequate compensation. Sheinman alleges that National Deli also intended to materially damage and/or destroy Sheinman's viability as a competitive business in the marketplace. The Complaint lists the specific actions of National Deli that allegedly breached its duties under the Asset Rental Agreement, which include, but are not limited to: failing to reimburse Sheinman for business expenses as agreed to; interfering with and damaging Sheinman's relationships with its customers, vendors and suppliers; unjustifiably terminating valuable and necessary employees of Sheinman; falsely accusing Sheinman's principals of theft; intentionally shipping product to customers not in conformity with the high standards of the Sheinman brand name or the quality control standards required under the Asset Rental Agreement; and engaging in a conspiracy designed to drive Sheinman's principals into an early termination of the Asset Rental Agreement.

Plaintiff originally filed this Complaint in the Court of Common Pleas of Philadelphia County in December 2007, and Defendant removed to this Court in January 2008. Plaintiff's Complaint alleges breach of contract (Count I), fraud in the inducement (Count II), unjust enrichment (Count III), and tortious interference with contractual and business relationships (Count IV).

## **II. DISCUSSION**

### **A. Legal Standard for Rule 12(b)(6) Motion to Dismiss**

When considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true all allegations in the complaint, draw all reasonable inferences

therefrom, and view them in the light most favorable to the plaintiff.<sup>3</sup> The United States Supreme Court has recently clarified this standard of review, explaining that “[a] plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do” without the allegation of sufficient facts in support.<sup>4</sup> In order to survive a motion to dismiss, a plaintiff must allege facts that “raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).”<sup>5</sup> A court may grant a 12(b)(6) motion only “if it appears to a certainty that no relief could be granted under any set of facts which could be proved.”<sup>6</sup>

## **B. Breach of Contract**

Defendant asserts that the Complaint contains only two factual allegations that could give rise to a breach of contract claim, and that all other factual allegations in the Complaint concerning breach of contract should be dismissed for failure to state a claim. Plaintiff argues that the Complaint contains a clear and plain statement of its breach of contract claim and that anything that could be considered a breach of the express covenant of good faith and fair dealing in the Asset Rental Agreement would constitute a breach thereof. To state a claim for breach of contract under Pennsylvania law, a plaintiff must plead: 1) the existence of a contract, including its essential terms; 2) a breach of a duty imposed by the contract; and 3) resultant damages.<sup>7</sup> Paragraph number 24 of

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<sup>3</sup> Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989).

<sup>4</sup> Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007) (internal citations omitted).

<sup>5</sup> Id. (internal citations omitted).

<sup>6</sup> D.P. Enter. Inc. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir. 1984).

<sup>7</sup> E.g., Ware v. Rodale Press, Inc., 322 F.3d 218, 225-26 (3d Cir. 2003) (citing CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999)).

Plaintiff's Complaint sets out facts alleging breach of the Asset Rental Agreement in twelve different subsections lettered (a) through (l). Defendant's Motion specifically argues that only subsections (a) and (k) – alleging breach of its reimbursement and quality control obligations – could possibly establish a claim for breach of contract, if those allegations are supported by the facts. The Court agrees. Only subsections (a) and (k) of the Complaint address essential terms of the contract and breach thereof. All of the other allegations of breach of contract essentially assert different instances of breach of the covenant of good faith and fair dealing, as Plaintiff's Response in Opposition to Defendant's Motion concedes.

Plaintiff erroneously asserts that because the Asset Rental Agreement contains an express covenant of good faith and fair dealing that a breach thereof is sufficient to establish a breach of contract claim. Pennsylvania does not recognize a claim for breach of the covenant of good faith and fair dealing as an independent cause of action.<sup>8</sup> In order to plead a cause of action for breach of the covenant of good faith, whether it is an express or implied covenant, a plaintiff must properly plead the elements of a claim of breach of contract.<sup>9</sup> In other words, a plaintiff must allege facts to establish that a contract exists or existed, including its essential terms, that defendant failed to comply with the covenant of good faith and fair dealing by breaching a specific duty imposed by the contract *other than the covenant of good faith and fair dealing*, and that resultant damages were incurred by plaintiff. Because Plaintiff's Complaint fails to properly allege facts that establish a breach of a specific duty imposed by the Asset Rental Agreement, aside from the express covenant of good faith

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<sup>8</sup> E.g., Burland v. ManorCare Health Servs., Inc., No. 98-4802, 1999 WL 58580, at \*4 (E.D. Pa. Jan. 26, 1999).

<sup>9</sup> See, e.g., Temple Univ. Hosp., Inc. v. Group Health, Inc., No. 05-102, 2006 WL 146426, at \*5-6 (E.D. Pa. Jan. 12, 2006).

and fair dealing, we will dismiss Plaintiff's breach of contract claims other than those predicated on subsections (a) and (k) of paragraph 24 of the Complaint.<sup>10</sup>

### **C. Fraud in the Inducement**

Defendant asserts that Plaintiff's fraud in the inducement claim should be dismissed because it fails to state a fraud claim with the sufficient particularity required by Federal Rule of Civil Procedure 9(b), and because it is barred by the "gist of the action" doctrine and the parole evidence rule. The Court first addresses the parole evidence rule. The parole evidence rule applies when prior statements and representations contradict, conflict, add, modify or vary the terms of a contract and fall within the scope of the integrated agreement.<sup>11</sup> The Complaint alleges that National Deli represented to Plaintiff that it "desired in good faith to enter into a fair and mutually-beneficial business relationship"<sup>12</sup> during the discussions between the parties prior to entering into the Asset Rental Agreement, and that Defendant fraudulently induced Plaintiffs to enter the agreement because they never intended to cause National to honor its duties and obligations thereunder.

Based upon the parties' pleadings and the Court's own review of the contract at issue, we find that the Asset Rental Agreement is a fully integrated contract, which contains an express provision stating that in entering the Asset Rental Agreement, neither party has relied on any claims, representations or warranties made by the other, except as expressly set forth therein. Therefore, the parole evidence rule squarely applies here because Plaintiff is seeking to offer evidence of

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<sup>10</sup> Plaintiff's will be granted leave to re-file breach of contract claims based on violation of the covenant of good faith and fair dealing that properly lay out facts illustrating breach of duties specifically imposed by the Asset Rental Agreement other than the covenant of good faith and fair dealing.

<sup>11</sup> E.g., Prof'l Sys. Corp. v. Opex Postal Techs., No. 05-2689, 2006 WL 573798, at \*2 n.5 (E.D. Pa. March 8, 2006).

<sup>12</sup> Compl. ¶ 14.

representations made prior to the execution of the Asset Rental Agreement to contradict an express provision thereof. As it is well established that “fully integrated contracts preclude fraudulent inducement claims,”<sup>13</sup> this claim will be dismissed as barred by the parole evidence rule. Because the fraudulent inducement claim is defeated by the parole evidence rule, we do not need to address Defendant’s arguments based on the gist of the action doctrine and Rule 9(b).

#### **D. Unjust Enrichment**

Defendant argues that Plaintiff’s unjust enrichment claim should be dismissed because this claim is unavailable where an express written agreement governs the relationship of the parties. Plaintiff’s argues that Federal Rule of Civil Procedure 8(d)(2) allows plaintiffs to claim unjust enrichment in the alternative to a breach of contract claim. Although in Pennsylvania, a contract prevents a party from bringing a claim of unjust enrichment, Federal Rule of Civil Procedure 8(d)(2) allows pleading in the alternative on this type of claim in some circumstances. Courts in this district have permitted plaintiffs to pursue alternative theories of discovery based on breach of contract and unjust enrichment, even where the existence of a contract would preclude recovery for unjust enrichment.<sup>14</sup> However, the facts of those cases are distinguishable from the case at bar. In United States v. Geri-Care, Inc., the court allowed an unjust enrichment claim to survive defendant’s motion to dismiss because it found that defendants failed to prove that a contract or another adequate remedy at law existed.<sup>15</sup> Similarly, in United States v. Kensington Hospital, the court allowed an alternative

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<sup>13</sup> Interwave Tech., Inc. v. Rockwell Automation, Inc., No. 05-398, 2005 WL 3605272, at \*19 (E.D. Pa. Dec. 30, 2005).

<sup>14</sup> United States v. Kensington Hosp., 760 F. Supp. 1120, 1135 (E.D. Pa. 1991); United States v. Geri-Care, Inc., No. 89-5720, 1990 U.S. Dist. LEXIS 1136, at \*7-8 (E.D. Pa. Feb. 2, 1990), vacated on other grounds.

<sup>15</sup> 1990 U.S. Dist. LEXIS 1136, at \*8.

claim for unjust enrichment where plaintiff had claimed breach of contract because the contract at issue only encompassed a part of the relationship between the parties.

In this case, the agreement at issue is a fully integrated contract and, by its terms, it governs the entire relationship of the parties. Therefore, we disagree with Plaintiff's argument that Rule 8(d)(2) allows pleading in the alternative in this case. Rule 8 only allows alternative claims to be plead if all of the claims are sufficient on their own. Here, even if the breach of contract claim fails, the unjust enrichment claim is still insufficient because Pennsylvania law prohibits unjust enrichment claims where a contract governs the relationship of the parties, as is the case here. The bar to this type of claim is not altered when unjust enrichment is plead in the alternative to an unsuccessful breach of contract claim as the relationship of the parties is still governed by a valid contract, and therefore, there is no reason to apply the quasi-contract doctrine of unjust enrichment. Plaintiff's unjust enrichment claim will be dismissed.

#### **E. Tortious Interference With Contractual and Business Relationships**

Defendant argues that Plaintiff's claim of tortious interference with contractual and business relationship should be dismissed for failure to plead the requisite elements and because it is barred by the gist of the action doctrine. To set out a claim for tortious interference with contract under Pennsylvania law, plaintiffs must plead: 1) the existence of a contractual relationship between Plaintiff and a third party; 2) purposeful action by the defendant, specifically intended to harm the existing relationship; 3) the absence of privilege or justification on the part of the defendant; and 4) actual legal damages as a result of defendant's conduct.<sup>16</sup> Plaintiff's Complaint alleges that Defendant intentionally interfered with Plaintiff's business and contractual relationships with its customers by

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<sup>16</sup> E.g., Pelagatti v. Cohen, 536 A.2d 1337, 1343 (Pa. Super. Ct. 1987).



making disparaging remarks about Plaintiff's principals and personnel to its customers, vendors and suppliers, in a deliberate effort to cause those entities to discontinue purchasing from Plaintiff and deal directly with Defendant. Plaintiff further alleges that it has sustained damages in excess of \$50,000 as a result of National Deli's conduct. Defendant argues that Plaintiff has failed to allege absence of privilege or justification on defendant's part, and therefore, this claim should be dismissed.

Defendant argues that gist of the action doctrine bars Plaintiff's tortious interference claim. The gist of the action doctrine bars tort claims that essentially complain of a breach of contract.<sup>17</sup> Courts have held that this doctrine bars tort claims: 1) arising solely from a contract between the parties; 2) where the duties allegedly breached were created by and grounded in the contract itself; 3) where liability stems from a contract; or 4) where the tort claim essentially duplicates a breach of contract claim or the success of the tort claim is wholly dependant on the terms of a contract.<sup>18</sup> If Plaintiff's claim "essentially alleges a breach of duties that flow from an agreement between the parties, the claim is contractual in nature, whereas if the duties allegedly breached were a type imposed on members of society as a matter of social policy, the claim is essentially tort-based," and will not be barred by the gist of the action doctrine.<sup>19</sup> Therefore, our analysis here turns on whether the duties allegedly breached by Defendant are created by and grounded in the Asset Rental Agreement.

Under similar circumstances, in Chemtech International, Inc. v. Chemical Injection

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<sup>17</sup> E.g., Hart v. Arnold, 884 A.2d 316, 339 (Pa. Super. Ct. 2005).

<sup>18</sup> E.g., id. at 340 (citing eToll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 19 (Pa. Super. Ct. 2002)).

<sup>19</sup> Orthovita, Inc. v. Erbe, No. 07-2395, 2008 U.S. Dist. LEXIS 11088, at \*12 (E.D. Pa. Feb. 14, 2008) (quoting Wilmington Fin., Inc. v. Am. One Fin., Inc., No. 06-5559, 2007 U.S. Dist. LEXIS 55738, at \*6 (E.D. Pa. July, 31, 2007)).

Technical, Inc., the Third Circuit affirmed the Eastern District of Pennsylvania’s dismissal of a tortious interference based on the gist of the action doctrine.<sup>20</sup> In Chemtech, plaintiff’s tortious interference claim alleged that defendant dealt directly with plaintiff’s customers and induced distributors not to deal with plaintiff but to deal with them directly, all without regard to plaintiff’s agreements with the distributors and in breach of the agreement between plaintiff and defendant.<sup>21</sup> The Third Circuit held that plaintiff did “not have a right to be free from competition and [defendant] has no duty ‘imposed by law as a matter of social policy’ not to compete with [plaintiff]. Only a contract can confer such a right and impose such a duty . . . .”<sup>22</sup> Sheinman’s tortious interference claim alleges almost identical facts: that Defendant intentionally interfered with Plaintiff’s business and contractual relationships to cause its customers, vendors and suppliers to discontinue purchasing from Plaintiff and deal directly with Defendant. Following the Third Circuit’s holding in Chemtech, we find that the duties allegedly breached by Defendant were not imposed as a matter of social policy, but rather flowed from the Asset Rental Agreement. Therefore, the gist of the action doctrine bars Plaintiff’s tortious interference claim here as the duties allegedly breached were grounded in the contract between the parties.

### **III. CONCLUSION**

For the foregoing reasons, Defendant’s Motion to Dismiss in Part will be granted. We will dismiss Plaintiff’s allegations of breach of contract predicated on breach of the covenant of good faith and fair dealing (Count I), fraud in the inducement (Count II), unjust enrichment (Count III), and

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<sup>20</sup> 170 Fed. App’x 805, 809 (3d Cir. 2006).

<sup>21</sup> Id.

<sup>22</sup> Id.

tortious interference with contractual and business relationships (Count IV).

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>SHEINMAN PROVISIONS, INC.,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>CIVIL ACTION</b>
	)	<b>NO. 08-cv-453</b>
<b>NATIONAL DELI, LLC,</b>	)	
	)	
<b>Defendant.</b>	)	

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**ORDER**

**AND NOW**, this 15th day of July, 2008, upon consideration of Defendant's Motion to Dismiss [Doc. No. 5], Plaintiff's Response in Opposition [Doc. No. 37], and Defendant's Reply [Doc. No. 40], it is hereby **ORDERED** that Defendant's Motion is **GRANTED**, as follows:

1. Plaintiff's breach of contract claims based on breach of the express covenant of good faith and fair dealing (Count I) are **DISMISSED** without prejudice, and Plaintiff's remaining breach of contract claims remain;
2. Plaintiff's fraudulent inducement claim (Count II) is **DISMISSED** with prejudice;
3. Plaintiff's unjust enrichment claim (Count III) is **DISMISSED** with prejudice;
4. Plaintiff's tortious interference with contractual and business relationships claim is **DISMISSED** with prejudice; and
5. Plaintiff is granted leave to file amended pleadings on its breach of contract claim consistent with this Memorandum Opinion within **twenty (20) days** of the date of this Order.

It is so **ORDERED**.

**BY THE COURT:**

**/s/ Cynthia M. Rufe**

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**CYNTHIA M. RUFÉ, J.**